



COUNTY COMMISSIONERS

John Hutchings
 District One
 Gary Edwards
 District Two
 Tye Menser
 District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
 FOR THURSTON COUNTY**

In the Matter of the Application of) NO. 2019100758
)
Scott Manke) FINDINGS, CONCLUSIONS,
) AND DECISIONS
 For a Reasonable Use Exception,)
 Shoreline Conditional Use Permit, and)
Shoreline Substantial Development Permit)

SUMMARY OF DECISIONS

The request for a reasonable use exception to authorize two previously constructed accessory buildings (a detached garage and a home office) and to expand the existing single-family residence is **DENIED**. The requests for a shoreline conditional use permit to authorize previously constructed retaining walls and for a shoreline substantial development permit to authorize a previously constructed stair tower within a Conservancy shoreline must also be **DENIED**.

SUMMARY OF RECORD

Request

Scott Manke (Applicant) requested a reasonable use exception (RUE), shoreline conditional use permit (SCUP), and shoreline substantial development permit (SSDP) to authorize the following construction at 9020 Baird Road NW, Olympia, Washington:

RUE

- Approximately 1,100 square foot addition to an existing single-family residence within stream, shoreline, landslide hazard and wetland buffers
- 2,151 square foot detached garage apron, and shed (previously constructed without permits) within shoreline, landslide hazard, and wetland buffers
- 784 square foot detached home office (previously constructed without permits) within shoreline, landslide hazard, and wetland buffers

SCUP

- Retaining walls within Conservancy shoreline (previously constructed without permits)

SSDP

- Stair tower within Conservancy shoreline (previously constructed without permits)

Hearing Date

The Thurston County Hearing Examiner conducted an open record public hearing on the request on October 22, 2019.

Testimony

At the open record public hearing, the following individuals presented testimony under oath:

Leah Davis, Associate Planner, Thurston County
Dawn Peebles, Thurston County Environmental Health
Arthur Saint, Thurston County Public Works
Mark Biever, LPG, L.E.G, County Geologist/Water Resources Specialist
Kathy Hargrave, Applicant Representative
Chad Wallin, Applicant Representative
James Brigham, Applicant Representative
Scott Manke
Ralph Provencal
Michael Zittel
Ron Pickinon, Applicant's contractor
Kellen Manke, son of the Applicant

Exhibits

At the open record public hearing, the following exhibits were admitted into the record:

Exhibit 1	Land Use and Environmental Review Section Report with the following Attachments:
Attachment a	Notice of Public Hearing
Attachment b	Project matrix
Attachment c	Master Application, received February 21, 2019
Attachment d	Reasonable Use Exception application, received February 21, 2019
Attachment e	CPED hold letter, dated March 18, 2019
Attachment f	Reasonable Use Exception application (revised) and RUE narrative addendum (5 pages), dated March 19, 2019
Attachment g	JARPA application, dated February 21, 2019

Attachment h	SEPA application, dated February 21, 2019
Attachment i	Site Plan, (revised) received July 10, 2019
Attachment j	Site plan (enlarged)
Attachment k	Hold letter, dated May 8, 2019
Attachment l	Critical areas report (revised), dated May 31, 2019
Attachment m	Habitat Management Plan, received February 21, 2019
Attachment n	Geotechnical Report, dated June 22, 2017
Attachment o	Geological Assessment letter, dated June 14, 2017
Attachment p	Geotech documents review memorandum from Mark Biever, County Geologist (6 pages w/photos), dated April 30, 2019
Attachment q	Comment letters from Ecology, dated March 21 and April 9, 2019
Attachment r	SEPA notice of application, mailed March 20, 2019
Attachment s	MDNS, issued October 4, 2019
Attachment t	Comment email from Squaxin Tribe, dated March 13, 2019
Attachment u	Comment letter from Nisqually Tribe, dated March 7, 2019
Attachment v	Comment email from Chris Edmark, TC Plans Examiner, dated March 7, 2019
Attachment w	Memorandum from Amy Crass, Environmental Health, dated June 4, 2019
Attachment x	Response letter from Sitts & Hill, dated July 10, 2019
Attachment y	Memorandum from Amy Crass, Environmental Health, dated July 23, 2019 (with attached documentation of email being sent).
Attachment z	Final memorandum from Amy Crass, Environmental Health, dated October 2, 2019
Attachment aa	Email comment from ORCAA, dated March 12, 2019

- Attachment bb Aerial photo from Washington Coastal Atlas website showing unstable bluff
- Attachment cc Photo of stair tower base (in the distance)
- Attachment dd Photo of retaining wall
- Attachment ee Photo of construction debris dumped on shoreline bluff
- Attachment ff Photo of home office/sanctuary
- Exhibit 2 Photographs of posted hearing notice (submitted by Planning Staff)
- Exhibit 3 Corrected MDNS, issued October 4, 2019
- Exhibit 4 Critical areas buffer exhibit (submitted by Applicant)
- Exhibit 5 Proposed on-site-septic design, prepared by Jim Henry Design Services (not yet reviewed by County)
- Exhibit 6 Thurston County Code Chapter 20.09A
- Exhibit 7 Six aerial photos of site submitted by Applicant
 - a. 1990 Google Earth image
 - b. 2003 Google Earth image
 - c. 2018 Google Earth image
 - d. County GIS photo taken between 1992 and 1997
 - e. County GIS photo taken between 2000 and 2002
 - f. County GIS photo taken July 11, 2006
- Exhibit 8 Letter from Grette and Associates, responding to County Staff report, dated October 21, 2019
- Exhibit 9 Site Plan depicting the onsite location of required critical area setbacks, dated June 22, 2017¹
- Exhibit 10 Site Plan depicting structure setbacks from critical areas, dated October 22, 2019

Based upon the record developed at the open record hearing, the Hearing Examiner enters the following findings and conclusions.

¹ Exhibit 9 (dated 2017) appears to depict the wetland much farther to the west, and in fact entirely off site, which is inconsistent with location of the wetland delineation depicted in the critical areas report (Exhibit 1.L), Exhibit 4 (dated 2019), and the post-hearing submittal at Exhibit 10. Assuming this is because Exhibit 9 was created prior to revisions of the critical areas report, Exhibit 9 will not be relied upon for information about setbacks from critical areas.

FINDINGS

1. The Applicant requested a reasonable use exception (RUE), shoreline conditional use permit (SCUP), and shoreline substantial development permit (SSDP) to authorize the following construction at 9020 Baird Road NW, Olympia, Washington²:

RUE

- Additions totaling approximately 1,100 square feet to an existing single-family residence within stream, shoreline, landslide hazard, and wetland buffers
- 2,151 square foot detached garage apron, and shed (previously constructed without permits) within shoreline, landslide hazard, and wetland buffers
- 784 square foot detached home office (previously constructed without permits) shoreline, landslide hazard and wetland buffers

SCUP

- Retaining walls within Conservancy shoreline (previously constructed without permits)

SSDP

- Stair tower within Conservancy shoreline (previously constructed without permits)

Exhibits 1, 1.B, 1.C, 1.D, 1.F, 1.G, 1.I, 1.J, and 4.

2. The applications were submitted on February 21, 2019 and were determined to be complete for purposes of commencing County review on March 15, 2019. *Exhibit 1.*
3. The subject property is 4.76 acres in area and is zoned Rural Residential Resource – One Dwelling Unit Per Five Acres (RRR 1/5), a zone which allows single-family and two-family residences, agriculture, accessory farm housing, and home occupations as primary permitted uses. *Thurston County Code (TCC) 20.09A.020; Exhibits 1 and 6.* The purpose of the RRR 1/5 zone is described in TCC 20.09A.010 as follows:

... to encourage residential development that maintains the county's rural character; provides opportunities for compatible agricultural, forestry and other rural land uses; is sensitive to the site's physical characteristics; provides greater opportunities for protecting sensitive environmental areas and creating open space corridors; enables efficient road and utility systems; and does not create demands for urban level services.

TCC 20.09A.010.

4. The subject property is developed with a lawfully-constructed single-family residence and attached garage (*see photo Exhibit 1.FF*).³ Other development existing onsite

² The legal description of the subject property is 4-19-1W 4.76A LOT 2 LESS 19.59A; also known as Tax Parcel No. 11904130700. *Exhibit 1.*

³ The residence and attached garage were built within onsite critical area buffers prior to adoption of the current critical areas ordinance, and thus are considered legally nonconforming. *Leah Davis Testimony; Exhibit 1.*

includes: an unpermitted stair tower to the beach, which was constructed in approximately 1992 at the around same time as the residence; an unpermitted detached garage, which was constructed in the late-1990s; and a detached home office, which was constructed in approximately 2012.⁴ At the same time the detached home office was built, unpermitted wood retaining walls were added to the uphill side of a cut above a road down to the beach that predated the Applicant's purchase of the property. The Applicant has owned the property since the residence was built. Based on County records, the residence is at least 3,000 square feet in area, and the attached garage is approximately 700 square feet in area. Surrounding development consists of low-density single-family residences and large forested tracts. Zittel's Marina is west of the subject property. *Exhibits 1, 1.G, 1.M, 1.BB, 1.CC, 1.FF, and 7; Testimony of Chad Wallin and Kellen Manke.*

5. The standards applicable to development in the RRR 1/5 zone include a minimum lot area of five acres, a maximum hard surface coverage for new development of 10% (in this case, 12,458 square feet calculated from an uplands area of 2.86 acres or 124,582 square feet of uplands), and minimum front, side and rear yard setbacks of 20 feet, five feet, and five feet, respectively.⁵ *Exhibits 1 and 6.*
6. The Thurston County Code (TCC) defines "hard surface" as "an impervious surface, a permeable pavement, or a vegetated roof, in contrast with vegetated permeable soils." *TCC 20.03.040(62)*. TCC 20.07.090 provides certain exemptions from the hard surface calculation, as well as certain credits (such as for retaining native vegetation). It is not clear from Planning Staff's analysis or the Applicant's submittals whether any of these would apply. However, based on the calculations contained on the submitted site plans, the total impervious surface coverage of existing and proposed development on the (excluding stair tower) would be 18,694 square feet, broken down as follows:

Existing, authorized development:

Asphalt driveway: 9,883 square feet

Combined residence, garage, and deck: 5,004 square feet

Subtotal of existing, authorized development: 14,887 square feet

Existing unpermitted development requiring RUE:

Detached garage, apron, and shed⁶: 2,151 square feet

Detached home office, patio, and deck: 784 square feet

Proposed development requiring RUE:

⁴ The application materials refer to this structure as a "home office/sanctuary." An Applicant representative explained that "sanctuary" is meant to convey that it is used as a space separate from the house where residents can get away from other activities in the home. *Kathy Hargrave Testimony*. For the sake of simplicity, these findings will refer to the structure simply as a home office.

⁵ Applicant representatives disputed Planning Staff's assertion that the hard surfaces calculation is based on net uplands area versus gross site area. The undersigned did not find it necessary to resolve this dispute in deciding the permit, because even had the Applicant's interpretation been upheld, it would not have affected the outcome of the applications. This matter is not an appeal of a code interpretation.

⁶ The shed is immediately northwest of the detached garage, within the same critical area buffers. Due to its small size it is exempt from building permit requirements, although critical area setbacks still apply. *Exhibits 1 and 4.*

Kitchen addition to residence: 341 square feet
Attached two-car garage addition: 531 square feet
Bonus room addition: 0 (would be over existing attached garage)
Subtotal of existing and proposed development requiring RUE:
3,807 square feet

Exhibit 1.I.

7. The subject property (including tidelands) is roughly triangular in shape, with the existing residence near its northern apex and the Puget Sound/Baird Cove shoreline along the northwest boundary. Access to the subject property is from the south, and the driveway serving the residence runs along the eastern property boundary. The accessory structures that are the subject of the RUE application are centrally located on the site. *Exhibit 4.*
8. The Shoreline Master Program for the Thurston Region (SMPTR) designates the subject property's shoreline as Conservancy; upland areas measuring 200 feet from the ordinary high water mark (OHWM) are subject to the jurisdiction of the SMPTR. Residential development is allowed in the Conservancy environment, subject to the applicable policies and regulations of the SMPTR. All elements of existing and proposed development for which permits are sought, including construction of the stair tower, must be reviewed for compliance with SMPTR provisions regulating residential development. *Exhibit 1; SMPTR Section Three, Chapter XVI.* A shoreline substantial development permit is required for the proposal because improvements have been built and/or are proposed within 200 feet of a regulated shoreline, the value of which exceeds the permit threshold of \$7,047.00. *Exhibits 1 and 1.G; WAC 173-27-040; WSR 17-17-007.*
9. The retaining wall on the subject property (approximately 100 linear feet long) supports the upslope side of an unpaved road leading from the central portion of the property to the shoreline. Applicant witnesses testified that the road to the shoreline existed prior to the Applicant's purchase of the property. *Chad Wallin and Kellen Manke Testimony.* The SMPTR does not contain a use category that is applicable to the retaining wall; the closest category is "shoreline protection,"⁷ which includes structures such as bulkheads. Pursuant to Washington Administrative Code (WAC) 173-27-160, an unclassified use may be authorized with a shoreline conditional use permit. County Staff determined that an SCUP would be required to authorize the constructed retaining wall.⁸ *WAC 174-27-160; WAC 173-27-030(4); Exhibits 1, 1.M, and 1.DD.*
10. Only two SMPTR regulations are directly applicable to stair towers. These regulations require stair towers to be designed by a licensed engineer if the location is mapped as "unstable" or "intermediate instability" in the Washington Coastal Zone Atlas and/or if the stair tower is 24 feet or greater in height (which both apply to the instant stair tower) and require stair towers to be designed to minimize obstructing views of adjoining residences. *Exhibit 1; SMPTR Section Three, Chapter XVI(C).*

⁷ The SMPTR defines "shoreline protection" as "action taken to reduce adverse impacts caused by current, flood wake or wave action. ..." *SMPTR, Section 3, Chapter XVIII, Section A.*

⁸ The undersigned takes note that and SSDP might also be required in order to legitimize the retaining wall as part of the overall shoreline project.

11. The stair tower was constructed on site without permits, and no evidence was submitted that it was designed by a licensed engineer. However, County Staff submitted that the engineering requirement could be satisfied if the design submitted with the after-the-fact building permit application were stamped by a licensed engineer. *Exhibit 1*. The stair tower does not obstruct views of adjoining residences, as it is below the steep marine bluff. *Exhibit 1.CC*.
12. The subject shoreline is also designated a fish and wildlife habitat conservation area under the County's critical areas ordinance (CAO). As a result of this designation, both the stair tower and the retaining wall are subject to the regulations of the CAO. With respect to the stair tower, the following CAO criteria must be satisfied in addition to the criteria of the SMPTR:
 - A. Avoid Habitat Impacts. Stair towers, stairways, and mechanical lifts shall not be located, designed, or constructed such that they would ground on surf smelt, Pacific sand lance, or herring spawning beds, or on eelgrass beds (*Zostera* spp.).
 - B. Treated Wood. Any treated wood proposed to be used in the construction of the stair tower, stairway and/or mechanical lift that would be placed in, over, or within 100 feet of the water is subject to county approval. Only treatments that pose a negligible risk to water quality shall be permitted.
 - C. Armoring. Riprap or other armoring shall not be placed on a beach to protect stair towers, stairways or mechanical lifts.
 - D. Footprint. The footprint of the stair tower, stairway, and mechanical lift shall be the minimum necessary to accommodate the proposed use.

TCC 24.25.310; Exhibit 1.

13. Washington Department of Fish and Wildlife mapping indicates that the subject shoreline provides potential habitat for Pacific sand lance and surf smelt. *Exhibit 1.M*. Most of the proposed stair tower is elevated above the shoreline; however, there is an at-grade storage shed built beneath the landing, which is not acknowledged in the Applicant's habitat management plan. *Exhibit 1.CC (compare with Exhibit 1.M, page 7)*. The Applicant's consultant (Grette) completed an ordinary high water mark (OHWM) survey and determined that the landing is above the OHWM, separated horizontally by a few feet and approximately 12 to 24 inches of water elevation above the OHWM. The habitat management plan also states that the base of the stairs is landward of the mean higher high water elevation in a sandy area that is vegetated with upland species. Such a location avoids habitats associated with forage fish species and eelgrass. *Exhibit 1.M, page 10; Chad Wallin Testimony*.
14. With respect to the treated wood criterion, the habitat management plan indicates that the stair tower posts and "a few timbers" (page 10) were constructed of treated materials. The Applicant's consultant submitted that the treated wood material "is assumed to have a negligible risk to water quality." *Exhibit 1.M, page 10*.

15. With respect to the armoring criterion, no armoring was placed on the beach to protect the stair tower. *Exhibit 1.M and 1.CC*. Testimony at hearing elucidated that the footings for the stair tower are placed on concrete pads, rather than on a concrete slab. *Chad Wallin Testimony*. Neither the testimony nor the photographs of the structure (in Exhibit 1.M) establish whether the storage enclosure under the lowest landing sits on a concrete slab. The photos do not depict the existing conditions on the beach at the base of the structure because they are taken from a significant distance away.
16. On the issue of the retaining wall, Applicant witness testimony asserted that the road that the wall was installed to protect predates the residence. *Testimony of Chad Wallin and Kellen Manke*. Repair and maintenance of existing roads are allowed in the shoreline area. *TCC 24.25.080, Table 24.25-3*. However, CAO regulations governing retaining walls require that slope stabilization actions utilize bioengineering or other soft stabilization techniques unless a qualified engineer or biologist demonstrates that “such techniques are not sufficient to protect structures and facilities listed in this section from erosion and slope failure.” *TCC 24.25.300; Exhibit 1*. A wall is considered by the SMPTR to be a structural solution. If bioengineering alone is inadequate, structural solutions may be considered. However, the regulations are clear that structural techniques may only be allowed to protect a legally permitted structure. *TCC 24.25.300.D(3)*. The project materials do not contain an engineering or biologist analysis of the necessity of a wood retaining wall, nor any discussion of whether the retaining wall is necessary to support a permitted structure.
17. There is a Type Ns stream to the east of the subject property that empties directly into Puget Sound, which requires a 150-foot buffer pursuant to the CAO at *TCC 24.25.020*. The required buffer encumbers the northeast portion of the property, including the residence and the proposed residential addition. The existing residence is set back approximately 100 feet from the stream (based on rough visual extrapolation from the map at Exhibit 1.L Appendix A), and the proposed additions would be closer to the stream than the existing improvements. The home office and detached garage are outside of the stream buffer. *Exhibit 1.L*. No information was submitted identifying the proposed setback of the residential additions to the stream.
18. There are two Category II wetlands along the northwest property boundary, one of which extends onto the subject property. Both are estuarine wetlands requiring 220-foot buffers pursuant to the CAO at *TCC 24.30.045*. The wetland buffers encumber most of the subject property, including the locations of the residence and accessory structures; only a small area in the southeast portion of the subject property adjacent to the road is unencumbered. *Exhibit 1.L and 4*. The home office is setback 105.56 feet at its closest point from Wetland A, and the detached garage is setback 124.96 feet from Wetland A. *Exhibit 10*. No measurements of the setback for any proposed improvements from Wetland B were provided.
19. For the subject shoreline, the CAO requires retention of a 250-foot wide marine riparian habitat area from the ordinary high water mark, within which development is restricted, plus an additional marine riparian management zone setback extending an additional 50

feet. The 250-foot marine riparian habitat area extends beyond the Category II wetland buffers, encumbering nearly all the subject property except for an approximate 50- to 60-foot wide strip at the southeast corner. The additional 50-foot setback covers most of this remaining area. The only unencumbered area (less than 1,000 square feet) is immediately adjacent to the east property boundary, in the narrow strip between the boundary and the driveway. *Exhibits 1.L and 4.* The home office is setback 75.81 feet from the surveyed marine ordinary high water mark, while the detached garage (with apron and shed) are setback 78.37 feet from the OHWM. *Exhibit 10.* No measurement of setbacks for the proposed residential and attached garage additions from the marine OHWM are provided in the materials.

20. The upland portion of the site is on top of a marine bluff that is classified as a marine bluff hazard area under the CAO. The bluff is steeply sloped, with localized gradients between 80 and 100%. The slope height ranges from 30 to 35 feet. The Coastal Zone Atlas of Washington classifies the upland portion of the site as S (Stable), and the marine bluff as U (Unstable). *Exhibits 1.O and 1.N.* Site slopes, which also include a ravine to the east of the existing residence, also satisfy the CAO criteria for a landslide hazard area due to gradients exceeding 40%. *Exhibits 1.N and 1.P.* Both types of geologic hazards require a minimum buffer of 50 feet.⁹ *Exhibit 1.N.* The residence is set back approximately 25 feet from the top of the marine bluff. *Exhibit 1.N.* The home office is setback 32.41 feet and the detached garage is setback 31.11 feet from the top of the bluff. *Exhibit 10.*
21. Based on the project geotechnical reports and review by the County's engineering geologist, Mr. Mark Bieber, the marine bluff is eroding. One of the geotechnical reports predicts regression of between 1.5 feet and five feet in 10 years. While the slope does not contain indicators of deep-seated landslides, there is evidence of smaller soil failures caused by perched groundwater daylighting on the upper portion of the slope. Mr. Bieber presented credible evidence that the marine bluff erosion that has been observed is occurring from these drainage-related processes at the top of the bluff and not primarily from the effect of wave action at the toe of the slope. *Exhibits 1.N and 1.P; Mark Bieber Testimony.*
22. TCC 24.50.020 allows vertical additions to legally established nonconforming structures, provided that if the structure is in a marine bluff hazard area or landslide hazard area or the associated buffers, a geological assessment must demonstrate that the addition would not negatively affect slope stability. The proposed bonus room addition would be above the existing attached garage, which is located on the southeast side of the residence. Consequently, while the bonus room addition was included with the other proposed additions for purposes of project review, an adverse decision on the RUE would not necessarily preclude development of the bonus room. The submitted geotechnical studies do not squarely address impacts associated with the bonus room, but Mr. Bieber, in his

⁹ TCC 24.15.015 provides multiple ways of establishing the minimum buffer, with the one providing the largest buffer applying. Fifty feet is the default if the other methodologies do not result in a larger buffer. In this case, the height of the marine bluff suggests a minimum buffer of at least 60 feet using the methodology of subsection B. *Exhibits 1 and 1.N.*

review of the geotechnical studies, notes that the slopes to the east of the residence are less steep than the marine-facing slopes, and that the east-facing slopes do not show signs of instability. *Exhibits 1.I and 1.P.*

23. The Applicant had its environmental consultant, Chad Wallin of Grette Associates, prepare a habitat management plan (HMP) to address CAO requirements for impact identification and mitigation. For the unpermitted accessory buildings, Mr. Wallin based his impact analysis on the historic condition of the critical area buffers as seen in aerial photography, and concluded that because the areas developed with the unpermitted accessory buildings appeared to him to have been dominated by Himalayan blackberry at the time of development (with the original trees logged sometime between 1977 and 1990), they “likely provided poor buffer function to the wetlands and FWHCAs.”¹⁰ *Exhibit 1.M, page 10.* Consequently, he submitted that construction of the accessory buildings did not result in an adverse impact to the buffers, and that without an adverse impact, compensatory mitigation could not be required under TCC 24.25.090. For the proposed additions to the residence, Mr. Wallin also concluded that there would be no adverse impact to the buffers, because the additions would extend into existing lawn, hardscape, and landscaped areas and would not require removal of any native vegetation. He submitted that due to the lack of identified impacts, there would be no net loss of habitat functions and values. The only mitigation proposed was to prepare a drainage and erosion control plan per TCC 24.35.320 and to follow best management practices during future construction activities. *Exhibits 1.M and 8; Chad Wallin Testimony.*
24. The unpermitted home office is connected to the on-site septic system (OSS) serving the residence in approximately 2012. During review of the instant applications, EHD Staff was unable to make a recommendation for or against approval because the connection of the home office to the OSS violates Article IV of the Sanitary Code and the Applicants did not timely respond to requests for additional information. *Dawn Peebles Testimony; Exhibits 1.W, 1.X, 1.Y, and 1.Z.* The existing plumbing improvements include a tank and pump, which convey the effluent from two sinks, a restroom, and a shower in the home office to the OSS, which conveys to the existing drainfield, in addition to the effluent from the three-bedroom residence. The drainfield is offsite to the south. The Applicant has obtained a professional prepared as-built septic design, submitted at hearing, that is ready (or nearly so) to be submitted to the County’s Environmental Health Division (EHD) for review. *Exhibit 5; Kathy Hargrave Testimony.*
25. Prior to the hearing, the Applicant retained an engineering firm to prepare as-builts and recommendations for bringing the unpermitted structures into compliance with applicable codes. The firm, Sitts & Hill Engineers, reviewed the structures and submitted the following. The garage needs a heavier header to be compliant with the International Building Code; the home office complies with the IBC; the retaining wall complies with the IBC (some segments are over four feet tall); and the stair tower has not yet reviewed by her office. Building permit applications have been submitted for the detached garage, home office, and retaining wall; no building permit application has been submitted for the

¹⁰ FWHCA stands for Fish and Wildlife Habitat Conservation Area (i.e., the subject Marine Riparian Habitat Area-designated shoreline).

stair tower to date. The Applicant's engineer testified that the project as a whole minimizes new impervious surface area to the extent possible. She also disagrees with the County's calculation for hard surface areas in the property, arguing that no provision of the Code requires or authorizes the County to exclude tideland areas from the site area for this calculation. As a result, the Applicant contends that the proposal would result in 8% impervious surface area onsite. *Kathy Hargrave Testimony; Exhibit 8.*

26. Thurston County reviewed the application for compliance with the State Environmental Policy Act (SEPA) and issued a mitigated determination of non-significance (MDNS) on October 4, 2019. The MDNS contains conditions relating to Washington Department of Ecology and Washington Department of Fish and Wildlife permitting, erosion and pollution control, and archaeological resources. *Exhibits 1.S and 3.*
27. Notice of the open record hearing was mailed to property owners within 500 feet of the site on October 4, 2019, published in *The Olympian* on October 11, 2019, and posted on site on October 10, 2019. *Exhibits 1, 1.A, and 2.*
28. Public comment at the hearing contained exclusively support for the proposal from various persons in the community, including: the "forensic architect" who reviewed the structures after their construction, Ralph Provencal, whose offered testimony attempting to clarify various factual and regulatory questions raised at hearing); neighbor and owner of the nearby Zittel Marina, Michael Zittel, who confirmed there were no view impacts to surrounding properties from the improvements already constructed and asserted that the worst of the slope failures result from Douglas fir trees that fall from the edge of the marine bluff); the contractor who built the unpermitted home office, detached garage, and retaining wall, Ron Pickinson, who asserted that he tried to build everything to code, that only scrub maples, scrub alders, and blackberries were removed during their construction, that the buildings are consistent with neighborhood character, that preexisting drainage, which was solely responsible for all damage to the marine bluff, had been upgraded and piped to foot of slope, and that the retaining wall was designed far in excess of anything that would have been required by code, and who explained that these structures were unpermitted because of "dumb contractor"; and the son of the Applicant, Kellen Manke, who works as a forester and has some experience with slopes, who testified that the road cut going down to the beach existed before the house was built and that the stair tower has not resulted in any impacts because there was no marine vegetation present where it lands on the beach. *Testimony of Ralph Provencal, Michael Zittel, Ron Pickinson, and Kellen Manke.*
29. Planning Staff determined that the criteria for RUE, SSDP, and SCUP approval were not shown to be met by the submitted materials and did not recommend approval. *Leah Davis Testimony; Exhibit 1.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear and decide applications for Reasonable Use Exceptions pursuant to TCC 2.06.010(F) and TCC 24.45.030.

The Hearing Examiner is granted jurisdiction to hear and decide applications for shoreline permits pursuant to RCW Chapter 36.70, WAC 173-27, TCC 19.04.010, and Section One, Part V of the Shoreline Master Program for the Thurston region. Pursuant to WAC 173-27-200, decisions to approve a shoreline conditional use permit must be submitted to the Department of Ecology for a final decision to approve, approve with conditions, or disapprove the permit.

Criteria for RUE Review

Pursuant to TCC 24.45.030, the Hearing Examiner shall grant a reasonable use exception if:

- A. No other reasonable use of the property as a whole is permitted by this title; and
- B. No reasonable use with less impact on the critical area or buffer is possible. At a minimum, the alternatives reviewed shall include a change in use, reduction in the size of the use, a change in the timing of the activity, a revision in the project design. This may include a variance for yard and setback standards required pursuant to Titles 20, 21, 22, and 23 TCC; and
- C. The requested use or activity will not result in any damage to other property and will not threaten the public health, safety or welfare on or off the development proposal site, or increase public safety risks on or off the subject property; and
- D. The proposed reasonable use is limited to the minimum encroachment into the critical area and/or buffer necessary to prevent the denial of all reasonable use of the property; and
- E. The proposed reasonable use shall result in minimal alteration of the critical area including but not limited to impacts on vegetation, fish and wildlife resources, hydrological conditions, and geologic conditions; and
- F. A proposal for a reasonable use exception shall ensure no net loss of critical area functions and values. The proposal shall include a mitigation plan consistent with this title and best available science. Mitigation measures shall address unavoidable impacts and shall occur on-site first, or if necessary, off-site; and
- G. The reasonable use shall not result in the unmitigated adverse impacts to species of concern; and
- H. The location and scale of existing development on surrounding properties shall not be the sole basis for granting or determining a reasonable use exception.

Additional Applicable Provisions of the Thurston County Code

TCC 24.01.010 - Purpose—Statement of policy for critical areas.

These regulations are intended to:

- A. Minimize loss of life, injury, and property damage due to natural hazards such as flooding, landslides, seismic events, and volcanic eruptions, minimize the need for emergency rescue, and avoid the cost of replacing public facilities;
- B. Identify and protect the functions and values of unique, fragile, and vulnerable elements of the environment such as fish and wildlife habitats, wetlands, and other ecosystems;
- C. Maintain water quality and quantity to meet human and wildlife needs;
- D. Recognize and address cumulative adverse impacts that could degrade or deplete water resources, wetlands or fish and wildlife habitat, or exacerbate flooding and landslide hazards;
- E. Alert the public to the development limitations and hazards associated with critical areas;
- F. Protect critical areas, associated buffers designed to protect the functions of critical areas, and their functions and values while allowing reasonable use of property by: directing activities not essential in such areas to other locations; providing for review of proposed uses and activities on properties containing critical areas or their buffers to achieve compliance with standards designed to minimize impacts to critical areas and associated buffers; and providing for mitigation of unavoidable impacts;
- G. Establish enforcement tools and processes designed to deter activities in violation of this chapter and provide for remedial action for unauthorized impacts to critical areas and their buffers;
- H. Implement the Washington State Growth Management Act (RCW 36.70A), including consideration of best available science in the designation, protection, and management of critical areas, with special consideration for the protection of anadromous fish; and
- I. Carry out the goals and policies of the Thurston County Comprehensive Plan.

TCC 24.01.035 - General requirements.

- A. **Avoid Impacts.** All uses and activities on sites containing critical areas and/or associated buffers or riparian or marine shoreline management zones shall be located, designed and constructed to avoid or, where that is not possible, minimize all adverse impacts to critical areas, associated buffers designed to protect the functions of critical areas, and management zones. The county shall not authorize impacts to critical areas or buffers unless the applicant demonstrates an inability to avoid impacts and that there will be no net loss of critical area functions as required in subsection (B). Impacts to critical areas and associated buffers that cannot be avoided shall be minimized by sensitive site design and appropriate precautions during the permitted activity and as specifically provided for in this title.
- B. **No Net Loss of Critical Area Functions.** Uses and activities carried out pursuant to this title shall result in equivalent or, if the applicant chooses, greater critical area functions. Impacts to critical areas, and associated buffers designed to protect the functions of critical areas, shall be repaired or mitigated through restoration, replacement, enhancement, or through purchase of credits at a mitigation bank consistent with the applicable provisions of this title.
- C. ...

TCC 24.01.037 - Mitigation sequencing.

Mitigation actions associated with development proposals impacting critical areas shall adhere to the following mitigation sequence:

- A. Avoiding the impact altogether by not taking a certain action or parts of an action;
- B. Minimizing impacts by limiting the degree or magnitude of the action and its implementation, by using appropriate technology, or by taking affirmative steps to avoid or reduce impacts;
- C. Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- D. Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;
- E. Compensating for the impact by replacing, enhancing, or providing substitute resources or environments; and/or
- F. Monitoring the impact and taking appropriate corrective measures.

TCC 24.03, Definitions (selected)

"Buffer, critical area" means that area which surrounds and protects the functions and values of critical areas from adverse impacts, minimizes public safety risks, and/or which may provide wildlife habitat integrally related to the critical area. See also "riparian habitat area."

"Enhancement" means an action which improves the functions of a stream, wetland, or other wildlife habitat.

"Fish and wildlife habitat conservation areas" are areas that serve a critical role in sustaining needed habitats and species for the functional integrity of the ecosystem, and which, if altered, may reduce the likelihood that the species will persist over the long term. These areas may include, but are not limited to, rare or vulnerable ecological systems, communities, and habitat or habitat elements including seasonal ranges, breeding habitat, winter range, and movement corridors; and areas with high relative population density or species richness. These also include locally important habitats and species.

"Functions and values" or "functions" means the beneficial roles served by critical areas. For example, functions and values associated with wetlands include: water quality protection and enhancement, fish and wildlife habitat, food chain support, flood storage, conveyance and attenuation, groundwater recharge and discharge, erosion control, wave attenuation, aesthetic value and recreation.

"Mitigation" or "compensatory mitigation" means replacing project-induced critical area losses or impacts, and includes, but is not limited to, restoration, creation or enhancement.

"No net loss" means that permitted uses in critical areas shall be designed and conducted in a manner consistent with WAC 197-11-768 to avoid, minimize and/or mitigate, in so far as practical, any resultant damage to the ecology and environment of the critical area. It may also encompass restoration of ecological functions necessary to sustain critical areas.

"Riparian habitat areas, marine" means areas adjacent to marine waters containing elements of both marine and terrestrial ecosystems that mutually influence each other. The width of these areas extends to that portion of the terrestrial landscape that directly influences the marine ecosystem by providing shade, fine or large woody material, nutrients, organic and inorganic debris, terrestrial insects, or habitat for riparian-associated wildlife. For the purposes of these regulations, riparian habitat areas are as specified in [Chapter 24.25 TCC](#).

"Riparian management zone" means an area established along the outer boundary of freshwater and marine riparian habitat areas, as specified in this title. Uses and activities within riparian management zones shall be conducted in a manner and/or restricted as necessary to minimize adverse impacts to riparian, freshwater and/or marine habitat.

TCC 24.05.090 - Submittal requirements—Reasonable use exception.

Applications for reasonable use exceptions under Chapter 24.45 TCC shall be filed with the department using the application form provided by the department. The application and any supporting materials shall provide the following information, as applicable:

- A. Information required for a Type III application specified in TCC 20.60.030;
- B. If applicable, delineation of the minimum setbacks required by Titles 20, 21, 22 or 23 TCC (zoning codes);
- C. Information required under Chapter 24.45 TCC, including but not limited to the eligibility of the property for a reasonable use exception, the review criteria, and other matters required to be addressed in Chapter 24.45 TCC;
- D. Any special reports required pursuant to this title;
- E. Any deviations from the provisions and standards of this title that would be needed to accommodate the proposed development or activity;
- F. Identification and evaluation of the potential impacts of the proposed development on the critical area(s), which includes associated buffer(s), and their functions, and proposed measures to avoid or mitigate the identified impacts; and
- G. Any other information the county deems necessary to make a determination regarding the request.

TCC 24.25.050 - Marine riparian habitat.

- A. Standard Marine Riparian Habitat Area Width. Marine riparian habitat areas of two hundred fifty feet in width shall be established along all marine shorelines subject to this chapter, except for "rural" shorelines (as designated by the Shoreline Master Program for the Thurston Region (1990)). These "rural" shorelines shall be regulated by the master program. The riparian habitat areas shall be measured, on a horizontal plane, landward from the OHWM or, if the OHWM cannot be identified, the top of the bank. The marine riparian habitat areas shall be retained in their existing condition, except as explicitly authorized by this chapter.
- B. Habitat Area Reduction. The approval authority may reduce the standard marine riparian habitat area to the minimum extent necessary to accommodate water-

dependent uses allowed under the Shoreline Master Program for the Thurston Region, consistent with TCC 24.25.110.

In addition to any required shoreline permit, the applicant shall submit a critical area report (see Chapter 24.35 TCC) demonstrating that impacts to all marine riparian habitat area functions and marine riparian habitats protected by this chapter will be avoided or, where that is not possible, minimized and mitigated. The approval authority will review this report in consultation with the WDFW and, as warranted, others with expertise prior to approving or denying the proposed habitat area reduction.

Isolated sections of riparian habitat areas may be excluded, consistent with TCC 24.25.025(B).

- C. Increased Marine Buffer. The width of the marine buffer shall be increased where there are steep slopes, the presence of important species or habitats, landslide hazard areas, or inadequate vegetation to protect water quality as provided for in TCC 24.25.030.

TCC 24.25.055 - Marine riparian management zone.

A marine riparian management zone shall be established which extends fifty feet, on a horizontal plane, landward from the landward edge of standard marine riparian habitat area, as configured prior to any reduction pursuant to TCC 24.25.050(B). The area where any riparian habitat area reduction occurred shall be included in the management zone. Development in the marine riparian management zone will be restricted as necessary to minimize adverse impacts to important marine habitats, consistent with Table 24.25-3 and related standards.

TCC 24.25.300 - Shoreline and slope stabilization.

The approval authority may authorize stabilization of stream banks, lakes, ponds, and marine shorelines only where it is determined that, it is necessary to protect lawfully established, existing threatened structures as defined in this title and by the Shoreline Master Program for the Thurston Region (1990) as amended and applicable; and that cannot be relocated with less impact to fish and wildlife habitat conservation areas or other critical areas; or to protect unusually high value natural resources/wildlife habitat (e.g., or priority species locations or a wetland associated with a stream). Stabilization of pond, marine or stream shorelines, is only allowed as provided for in the Shoreline Master Program, as amended, and consistent with this section. Any proposal for slope/bluff stabilization must be supported by a geological assessment from a qualified geotechnical professional and a biologist and shall adhere to the following preferential order:

- A. Nonstructural Shoreline Protective Techniques. When stabilization methods are deemed necessary by the director, nonstructural shoreline protective techniques are preferred to concrete bulkheads, riprap or other types of shoreline armoring. Nonstructural techniques may include but are not limited to: beach nourishment, coarse beach fill, gravel berms, vegetation plantings and bioengineering. Best available science shall be used to evaluate the best techniques for protection as determined by the director. Refer also to the

Washington Department of Ecology publications "Slope Stabilization and Erosion Control Using Vegetation" (1993, Publication 93-30), and "Marine Shoreline Armoring and Puget Sound" (2010, Publication 10-06-003).

- B. Bioengineering. Stabilization of stream, lake, pond and marine shorelines, if necessary, shall be accomplished with bioengineering or similar soft stabilization techniques unless the applicant's qualified engineer and biologist demonstrates that such techniques are not sufficient to protect structures and facilities listed in this section from erosion and slope failure. (See Washington's Integrated Stream bank Protection Guidelines for bioengineering designs.) The stabilization shall be designed and installed to minimize adverse impacts on the habitat's functions.
- C. Combination of Bioengineering and Hard Armoring. If the applicant's qualified engineer and biologist demonstrate to the approval authority's satisfaction that bioengineering alone will not be sufficient to protect structures and facilities listed in this section, the approval authority, in consultation with a biologist and qualified engineer, at the applicant's expense, may authorize a combination of bioengineering and structural solutions that is least damaging to the habitat. The stabilization shall be designed and installed to minimize adverse impacts on the habitat's functions. The structural stabilization solutions shall comply with subsection (D) below.
- D. Structural Techniques (e.g., bulkhead, gabion, riprap, revetments, or wall). If the applicant's qualified engineer and biologist demonstrate to the approval authority's satisfaction that the nonstructural techniques provided for in this section are not possible or will not be sufficient to protect structures and facilities listed in this section from erosion and slope failure, they may, in consultation with a biologist and qualified engineer at the applicant's expense, propose a structural stabilization solution consistent with the following:
 - 1. Hard armoring, such as rip-rap and bulkheads, may only be used when the applicant demonstrates to the approval authority's satisfaction that a public facility, public road, utility (not individual service lines that can be relocated), sole access road, or occupied structure cannot be safely and practically maintained without such measures. The armoring shall be the minimum dimension necessary to protect the structure.
 - 2. Hard armoring shall not be allowed along Type S or F streams, in marine habitat areas, or in salmonid spawning, migration or rearing areas unless it is necessary to protect critical public facilities, human life, or a threatened dwelling.

3. Structural techniques shall only be allowed along riparian habitat areas when:
 - a) It is to protect a legally permitted threatened structure; and
 - b) The residence and normal appurtenances are located within the 2:1 slope measured from the toe of the bluff or within the fifty-foot top of slope buffer, whichever is greater; and
 - c) Only if a geotechnical assessment completed per Chapter 24.35 TCC finds that the structure to be protected will be threatened based on the long-term erosion rate (thirty—fifty year average) within the next three years if toe protection is not provided.

E. Designed by Engineer. A professional engineer licensed in the State of Washington with demonstrated expertise regarding hydraulic actions along shorelines shall design stabilization projects along streams and marine shorelines in consultation with a qualified biologist.

F. Avoid Intrusion into the Important Habitat Area.

TCC 24.25.310 - Stair tower, stairway, and mechanical lift.

Stair towers, stairways, and mechanical lifts may be permitted consistent with the Shoreline Master Program for the Thurston Region, and the following requirements:

- A. Avoid Habitat Impacts. Stair towers, stairways, and mechanical lifts shall not be located, designed, or constructed such that they would ground on serf smelt, Pacific sand lance or herring spawning beds, or on eelgrass beds (*Zostera* spp.).
- B. Treated Wood. Any treated wood proposed to be used in the construction of the stair tower, stairway and/or mechanical lift that would be placed in, over, or within 100 feet of the water is subject to county approval. Only treatments that pose a negligible risk to water quality shall be permitted.
- C. Armoring. Riprap or other armoring shall not be placed on a beach to protect stair towers, stairways or mechanical lifts.
- D. Footprint. The footprint of the stair tower, stairway, and mechanical lift shall be the minimum necessary to accommodate the proposed use.

TCC 24.50.020 - Alteration or expansion of legally established nonconforming structures—
General rules.

Alteration or expansion of legally established nonconforming structures or uses, including structures or uses that do not require a permit, is allowed subject to all of the following:

- A. Maintenance. All legally established, nonconforming structures can be maintained (e.g., painting and repairs);
- B. Alteration. Legally established nonconforming structures may be altered within their existing building footprint. Additionally, attached decks, porches, and patios may be altered in their existing footprint, excluding the addition of permanent roof structures. If applicable, also see Chapter 24.20 TCC regarding limitations in frequently flooded areas. Legally established, attached nonconforming decks, porches, or patios shall not

be enclosed for use as livable space, unless the deck, porch, or patio is already covered by an existing permanent roof structure as determined by the approval authority;

- C. Expansion of conforming portions of a legally established nonconforming structure. If only a portion of the structure is nonconforming (e.g., lies within an important habitat area), expansion of the conforming portion of the structure is permitted provided the expansion does not extend into the critical area or associated buffer; and
- D. Vertical Additions. Expansion of the established nonconforming portion of the structure is prohibited, except for vertical additions consistent with applicable height regulations in the zoning district. Additions shall not be cantilevered to extend beyond the existing structure's footprint (outside wall at the foundation) into a critical area or associated buffer. Vertical additions to legally established portions of a nonconforming structure are only allowed within marine bluff or landslide hazard areas, or their buffers, if a geological assessment demonstrates that it will not negatively impact slope stability.
- E. Cantilevered alterations, expansions or additions to nonconforming portions of structures shall not extend beyond the existing building footprint into the critical area or its associated buffer.

TCC 24.50.025 - Expansion of impervious surfaces in riparian areas and pond buffers.

The approval authority may allow up to a five hundred square foot expansion of impervious surface, including an existing structure's footprint, within a riparian habitat area or pond buffer if it is determined that:

- A. All new impervious surfaces, which include structures, will be sited at a distance that is greater than or equal to the original structure(s) setback from the water body;
- B. The expansion would occur at least one hundred feet from a Type "S" or "F" stream and Type "N" stream draining to a Type "S" or "F" stream or marine waters;
- C. The area proposed for the expansion was lawfully developed prior to July 24, 2012 or, if not, the unlawful development was not caused by the present landowner or did not occur within the past seven years;
- D. If the riparian habitat area or pond buffer on the site between the water body and the primary structure has been degraded, the degraded area, or a portion of the degraded area equal to the size of the expansion, whichever is less, will be restored with native vegetation. The degraded area chosen must be the area nearest the most sensitive habitat as determined by the approval authority;
- E. The expansion, coupled with any proposed mitigation, would be at least as effective in protecting all of the riparian habitat or pond buffer's functions as under current conditions;
- F. The proposed expansion would be consistent with the shoreline master program for the Thurston Region, as amended, the impervious surface limits in the applicable zoning district, and other applicable provisions of this title;

- G. The applicant provides a performance surety consistent with Chapter 24.70 TCC to ensure survival or replacement of plants used in the restoration;
- H. No previous expansion has been allowed pursuant to this subsection; and
- I. The applicant will record a document with the subject property's title indicating that no further expansion of the structure's footprint or impervious surface is allowed within the riparian habitat area or pond buffer on the property.

TCC 24.50.060 - Development of existing lots—Critical areas excluding frequently flooded areas.

Existing lots with critical areas and their associated buffers, excluding frequently flooded areas, for which a complete application for a short plat, large lot subdivision, or subdivision, as defined in Chapter 18.08 TCC, was submitted before July 24, 2012, and other legally existing lots may be developed as follows with a critical area review permit:

- A. Except for seismic, volcanic, and mine hazard areas, all new construction of structures, facilities, utilities, access driveways and appurtenances shall be located outside of the critical area and the associated buffer unless otherwise permitted in this title;
- B. New development may be permitted on legal lots containing wetlands or buffers, consistent with other applicable provisions of this title.
- C. No new development or construction of structures, facilities, utilities, access driveways and appurtenances shall create a public safety risk, as determined by the approval authority;
- D. Enhancement or restoration (mitigation) of the affected critical area or associated buffer shall be required to offset the impacts of the proposed development, as approved by the approval authority;
- E. If a legal lot has less than three thousand five hundred square feet of buildable area outside of the critical area and its associated buffer, to accommodate the single family residential development including the primary structure, ordinary appurtenances, landscaping, and accessory structures, the approval authority may, with a critical area review permit, allow development to occupy a portion of the critical area buffer to the minimum extent necessary to provide a development site totaling no more than three thousand five hundred square feet provided:
 - 1. The development site shall be located in the outer fifty percent of the standard critical area buffer, except for wetlands and riparian habitat areas, where the development site shall be located in the outer twenty-five percent of the standard buffer. Development in the critical area and the inner fifty percent of the associated critical area buffer—or inner seventy-five percent of wetland and riparian area buffers—will require a reasonable use exception;
 - 2. The applicant shall demonstrate that due to physical constraints (e.g., topography, soil conditions, or the site's configuration), another configuration would not allow the development to occur without intrusion or with less intrusion into the critical area or buffer than the proposal;

3. The location and scale of existing development on surrounding properties shall not be the basis for granting or determining the location, scale and impact of a single family use allowed under this section;
 4. The encroachment into the critical area buffer shall be consistent with other requirements of this section for development on existing lots, requirements for a critical area review permit, and shall not have an adverse impact on species of concern, as determined by the approval authority;
 5. Site development, including clearing, grading, construction of structures, utilities, related appurtenances, and landscaping shall occupy the minimum area necessary to accommodate the use;
 6. Native tree and vegetation removal shall only be permitted to the minimum extent necessary to accommodate the proposed development, and shall not create a public safety risk;
 7. A revegetation plan consistent with this title for disturbed areas shall be submitted with the development application, and shall be completed prior to final occupancy or use;
 8. Landscaping shall not extend more than fifteen feet from the primary structure toward the important habitat or wetland;
 9. Any new structures within a critical area buffer shall be sited to avoid the creation of hazard trees;
 10. The approval authority may establish a construction setback to avoid encroachment into portions of the buffer not authorized for development, consistent with TCC Section 24.01.030;
 11. The approval authority may authorize use of additional area to the minimum extent necessary in a critical area buffer to accommodate an onsite sewage disposal system or well, consistent with other requirements of this title, only if there is no alternative;
 12. The use of this single-family residential exception shall not be a result of a self-created hardship such as subdividing the property, adjusting a boundary line, or other actions thereby creating the undevelopable conditions after July 24, 2012, or a self-created hardship created under the applicable standards of Chapter 17.15 TCC after February 1, 1994; and
- F. All other development or construction of primary structures, accessory structures, and appurtenances in the critical area and associated buffer is prohibited.

Criteria for review of requested Shoreline Permits

Shoreline Substantial Development Permit (WAC 173-27-150)

To be approved by the Hearing Examiner, the proposed shoreline substantial development permit must be consistent with:

- A. The policies and procedures of the Shoreline Management Act;
- B. The provisions of applicable regulations; and

C. The Shoreline Master Program for the Thurston Region.

A. *Shoreline Management Act*

Chapter 90.58 RCW, the Washington State Shoreline Management Act (SMA) of 1971, establishes a cooperative program of shoreline management between the local and state governments with local government having the primary responsibility for initiating the planning required by the chapter and administering the regulatory program consistent with the Act. The Thurston County Shoreline Master Program (SMPTR) provides goals, policies and regulatory standards for ensuring that development within the shorelines of the state is consistent the policies and provisions of Chapter 90.58 RCW.

The intent of the policies of RCW 90.58.020 is to foster “all reasonable and appropriate uses” and to protect against adverse effects to the public health, the land, and its vegetation and wildlife. The SMA mandates that local governments adopt shoreline management programs that give preference to uses (in the following order of preference) that: recognize and protect the statewide interest over local interest; preserve the natural character of the shoreline; result in long term over short term benefit; protect the resources and ecology of the shoreline; increase public access to publicly owned areas of the shorelines; and increase recreational opportunities for the public in the shoreline. The public's opportunity to enjoy the physical and aesthetic qualities of natural shorelines of the state is to be preserved to the greatest extent feasible consistent with the overall best interest of the state and the people generally. To this end uses that are consistent with control of pollution and prevention of damage to the natural environment, or are unique to or dependent upon use of the state's shoreline, are to be given preference.

B. *Applicable regulations from the Washington Administrative Code*

WAC 173-27-140 Review criteria for all development.

- (1) No authorization to undertake use or development on shorelines of the state shall be granted by the local government unless upon review the use or development is determined to be consistent with the policy and provisions of the Shoreline Management Act and the master program.
- (2) No permit shall be issued for any new or expanded building or structure of more than thirty-five feet above average grade level on shorelines of the state that will obstruct the view of a substantial number of residences on areas adjoining such shorelines except where a master program does not prohibit the same and then only when overriding considerations of the public interest will be served.

WAC 173-27-190 Permits for substantial development, conditional use, or variance.

- (1) Each permit for a substantial development, conditional use or variance issued by local government shall contain a provision that construction pursuant to the permit shall not begin and is not authorized until twenty-one days from the date of filing as defined in RCW 90.58.140(6) and WAC 173-27-130, or until all review proceedings initiated within twenty-one days from the date of such filing have been terminated; except as provided in RCW 90.58.140 (5)(a) and (b).

C. Shoreline Master Program for the Thurston Region

The Shoreline Master Program for the Thurston Region (SMPTR) designates the shorelands on the subject property as Conservancy. The policies and regulations that are applicable to the stair tower are contained in the “Residential Development” chapter (Section Three, Chapter XVI) of the SMPTR.

SMPTR Section Three, Chapter XVI, Part B. Policies.

1. Residential development on shorelines and wetlands should be planned with minimum adverse environmental and visual impact....

SMPTR Section Three, Chapter XVI, Part C. Regulations.

11. All stair towers meeting one of the following conditions must be designed by a licensed civil engineer:
 - a. The location proposed is mapped as “unstable” or “Intermediate Stability” in the Washington Coastal Zone Atlas prepared by the State Department of Ecology.
 - b. All stair towers 24 feet in height or greater.
 - c. Other instances where the building official determines that site conditions dictate the preparation of plans by a licensed civil engineer.
12. Stair towers shall be designed to minimize obstructing the views enjoyed by adjoining residences.

SMPTR Section Two, Chapter V. Regional Criteria.

- A. Public access to shorelines shall be permitted only in a manner which preserves or enhances the characteristics of the shoreline which existed prior to establishment of public access.
- B. Protection of water quality and aquatic habitat is recognized as a primary goal. All applications for development of shorelines and use of public waters shall be closely analyzed for their effect on the aquatic environment. Of particular concern will be the preservation of the larger ecological system when a change is proposed to a lesser part of the system, like a marshland or tideland.
- C. Future water-dependent or water-related industrial uses shall be channeled into shoreline areas already so utilized or into those shoreline areas which lend themselves to suitable industrial development. Where industry is now located in shoreline areas that are more suited to other uses, it is the policy of this Master Program to minimize expansion of such industry.
- D. Residential development shall be undertaken in a manner that will maintain existing public access to the publicly-owned shorelines and not interfere with the public use of water areas fronting such shorelines, nor shall it adversely affect aquatic habitat.
- E. Governmental units shall be bound by the same requirements as private interests.
- F. Applicants for permits shall have the burden of proving that a proposed substantial development is consistent with the criteria which must be met before a Permit is granted. In any review of the granting or denial of an application for a permit as provided in RCW 90.58.18.180 (1), the person requesting the review shall have the burden of proof.

- G. Shorelines of this Region which are notable for their aesthetic, scenic, historic, or ecological qualities shall be preserved. Any private or public development which would degrade such shoreline qualities shall be discouraged. Inappropriate shoreline uses and poor quality shoreline conditions shall be eliminated when a new shoreline development or activity is authorized.
- H. Protection of public health is recognized as a primary goal. All applications for development or use of shorelines shall be closely analyzed for their effect on the public health.

Shoreline Conditional Use Permit (WAC 173-27-160)

- 1. Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided that the applicant demonstrates all of the following:
 - A. That the proposed use is consistent with the policies of RCW 90.58.020 and the master program;
 - B. That the proposed use will not interfere with the normal public use of public shorelines;
 - C. That the proposed use of the site and design of the project is compatible with other authorized uses within the area and with uses planned for the area under the comprehensive plan and shoreline master program;
 - D. That the proposed use will cause no significant adverse effects to the shoreline environment in which it is to be located; and
 - E. That the public interest suffers no substantial detrimental effect.
- 2. In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020 and shall not produce substantial adverse effects to the shoreline environment.
- 3. Other uses which are not classified or set forth in the applicable master program may be authorized as conditional uses provided the applicant can demonstrate consistency with the requirements of this section and the requirements for conditional uses contained in the master program.
- 4. Uses which are specifically prohibited by the master program may not be authorized pursuant to either subsection (1) or (2) of this section.

Conclusions Based on Findings

A. Reasonable Use Exception

- 1. Based on the uses allowed in the RRR-5 zone and the uses of surrounding properties, single-family residential development is the only reasonable use of the subject property. However, the existing lawfully built residential development onsite constituted

reasonable use without the additional unpermitted structures or proposed expansion. *Findings 3, 4, and 7.*

2. A reasonable use with less impact on the critical areas and buffers *is* possible, as has existed onsite since approximately 1992. No credible evidence was submitted supporting a conclusion that the additional accessory structures and proposed residential expansion are necessary to accomplish reasonable residential use of the site. In considering what is reasonable, it should be noted that TCC 24.50.060.E allows for the establishment of a maximum 3,500 square foot residential building site (including accessory structures) within the outer 25% of a wetland buffer, without a RUE, if there is not 3,500 square feet of buildable land outside of the buffer. While this provision is not definitive as to what constitutes a reasonable use – and while reasonable use exceptions are expressly allowed – this provision supports the concept that the area of the use should be scrutinized when evaluating whether a reasonable use with less impact is possible. In this case, the Applicant had a residence, attached garage, and deck that already occupied 5,000 square feet of a highly constrained site. No evidence was presented establishing that such area is inadequate to accomplish reasonable residential use of the property. It follows that the unpermitted accessory structures and the proposed building additions, which substantially increase the development area on site, exceed what is needed for the reasonable use. Also, the second RUE criterion specifically suggests consideration of “a change in use, reduction in the size of the use, a change in the timing of the activity, a revision in the project design... [and] a variance for yard and setback standards” as means of demonstrating that there is no alternative that could have less impact. The Applicant has failed to demonstrate consideration of any alternative designs that would meet the intent of the criterion. *Findings 4, 7, 23, 25, and 28.*
3. Given the observed erosion of the marine bluff and failure to obtain permits for expansion of the onsite septic system beyond the use approved by the County, the record submitted does not show that the accessory structures and proposed additions do/would not threaten safety on or off the development site. *Findings 7, 21, and 24.*
4. The record presented does not show that the proposed reasonable use is limited to the minimum encroachment into the critical area and/or buffer necessary to prevent the denial of all reasonable use of the property. Even assuming that the proposed additional development could be argued to be needed to afford reasonable use (which has not been shown - see Conclusions 1 and 2), the unpermitted accessory structures were not sited so as to reduce impacts to critical area buffers to the maximum extent possible as required by the fourth RUE criterion. The site plans suggest that the structures could have been placed farther to the southeast to allow for wider buffers from the wetland, marine shoreline, and marine bluff, and potentially also from the offsite stream to the east. The Applicant, through its consultants, argued that because the subject property is nearly completely encumbered with critical areas or buffers, it would not be possible to reduce impacts. To the extent this argument suggests that location of development in a buffer does not matter, the undersigned rejects the argument. In the instant case, credible evidence shows that location matters particularly with respect to the actively eroding marine bluff, which is influenced by stormwater runoff. Not addressed in the record

presented is the issue of whether erosion on the marine bluff can also affect wildlife habitat in Puget Sound. *Findings 4, 7, 17, 18, 19, 20, 21, 22, 23, 25, and 28.*

5. For the reasons described in Conclusions 2 and 4, the Applicant has not demonstrated that the use would result in minimal alteration of the critical area with respect to impacts on hydrological conditions and geologic conditions. *Findings 4, 7, 17, 18, 19, 20, 21, 22, 23, 25, and 28.*
6. The record submitted failed to demonstrate that there will be no net loss of critical area functions and values. Applicant witnesses variously described the vegetation removed by placement of the unpermitted structures (with more to be removed if residential expansion is permitted) either as solely comprised of blackberries, or as a mix of scrub alder, scrub maple, and blackberries. Assuming this arguably self-serving testimony is accurate, regardless of its actual composition, the removed vegetation provided some amount of shelter and foraging to wildlife, some amount of water quality benefits, and some amount of water quantity benefits including runoff attenuation. The submitted critical areas evidence failed to identify the impacts that necessarily result from replacement of such vegetation with structures, which provide no wildlife habitat and increase stormwater runoff within 35 feet of the marine bluff. This failure renders the “no net loss” conclusion inadequate and not credible. The Applicant’s position – that placement of a structure in a buffer must be shown to do specific harm beyond reduction in buffer area – would render various provisions of the CAO meaningless and thus cannot be adopted. Following are a few examples.

TCC 24.01.035 - General requirements.

- A. Avoid Impacts. All uses and activities on sites containing critical areas and/or associated buffers or riparian or marine shoreline management zones shall be located, designed and constructed to avoid or, where that is not possible, minimize all adverse impacts to critical areas, associated buffers designed to protect the functions of critical areas, and management zones. The county shall not authorize impacts to critical areas or buffers unless the applicant demonstrates an inability to avoid impacts and that there will be no net loss of critical area functions as required in subsection
- B. Impacts to critical areas and associated buffers that cannot be avoided shall be minimized by sensitive site design and appropriate precautions during the permitted activity and as specifically provided for in this title.
- C. No Net Loss of Critical Area Functions. Uses and activities carried out pursuant to this title shall result in equivalent or, if the applicant chooses, greater critical area functions. ... (emphasis added)

At a very minimum, pursuant to TCC 24.01.037 compensatory mitigation is required for impacts to critical area buffers. “Compensatory mitigation” means replacing project-induced critical area losses or impacts, and includes, but is not limited to, restoration, creation or enhancement. *TCC 24.03.* Reduction in buffer area is a loss that requires mitigation to be approved. The materials submitted fail to make a good faith attempt at identifying, much less mitigating, impacts to the multiple critical area buffers that are

affected by the proposal. Further, the requested development that takes place within wetland, stream, and steep slope *buffers* all falls squarely within the regulated *marine riparian habitat area*, a critical area itself. TCC 24.25.050 requires the critical area report supporting an RUE request to demonstrate that “impacts to all marine riparian habitat area functions and marine riparian habitats protected by this chapter will be avoided or, where that is not possible, minimized and mitigated.” The submitted materials fail to make this required showing. The Applicant’s argument amounts to a claim of “no harm, no foul” without successfully demonstrating no harm. *Findings 4, 7, 13, 14, 15, 17, 18, 19, 20, 21, 22, 23, 25, and 28.*

7. Because all eight RUE criteria must be satisfied and the project has failed satisfy the first six, it is not necessary to enter conclusions on the remaining two criteria.

B. Shoreline Permits

1. The Applicant has not demonstrated compliance with the policies of the SMA and the SMPTR, a requirement that applies to both the SSDP and SCUP applications.
 1. SMPTR Regional Criterion (F) states that permit applicants have the burden of proving that a proposed substantial development is consistent with the criteria for approval. The Applicant provided little evidence in support of the shoreline permit applications. Notably absent were any discussion of the SSDP or SCUP criteria of approval and the cumulative impacts analysis required by WAC 173-27-160(2) for an SCUP application.
 2. The record contains insufficient information about the stair tower or retaining wall on which SSDP approval could be granted. The submitted materials do not sufficiently support a conclusion that a wood retaining wall was required (as opposed to other stabilization techniques (also failing to meet TCC 24.25.300). The dimensions of the footprint of the stair tower (including the storage area) are not provided, nor do the photos presented show the actual conditions on the ground around the stair tower sufficiently to see whether the storage shed under the lowest landing is on a concrete pad (also failing to satisfy the “minimum necessary” area in TCC 24.25.310.D). While the Applicant acknowledges that “some members” of the stair tower were likely made of treated wood, there is no attempt at fully reporting how many and which members, nor the current condition of the treated wood. Insufficient evidence was provided that the treated wood used in the stair tower would pose a negligible risk to water quality in order to gain County approval of its use.
 3. Contrary to the SMA’s policies and SMPTR Regional Policies B and H, which require preservation the natural character of the shoreline and protection of the ecology of the shoreline and public health, the Applicant proposed no mitigation for impacts to the shoreline environment caused by the unpermitted development activities within the regulated shoreline setback.

Findings 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 23, 24, 25, and 28.

2. With respect to the residential accessory structures, for which SSDP approval may also required because they are built within 200 feet of the shoreline and they may or may not

be exempted from permitting as typical appurtenances to a residence, the materials submitted do not show that the applicable shoreline regulations are met. Specifically, the accessory garage and office structures do not comply with the minimum 100-foot setback requirement for the Conservancy environment. *Findings 7, 8, 17, 18, 19, and 20.*

3. Pursuant to the County's Shoreline Master Program regulations set forth at TCC 19.14.010, "no permit or approval shall be granted pursuant to this title if there exists on the subject property any land use violation known by the approval authority unless explicitly authorized by this section. For purposes of this section, a land use violation is any violation of the Thurston County Critical Areas Ordinance" *TCC 19.14.010.* In this case, there are structures on site that constitute a violation of the CAO because the criteria for RUE approval have not been satisfied. Neither did the Applicant succeed in demonstrating that proposed residential expansion activities would conform to the CAO. *Conclusions A1 through A6.*

DECISION

Based on the preceding findings and conclusions, the requested applications for reasonable use exception, shoreline substantial development permit, and shoreline conditional use permit are denied.

DECIDED November 14, 2019.



Sharon A. Rice
Thurston County Hearing Examiner

NOTE: Pursuant to TCC 22.62.020(C)10, affected property owners may request a change in valuation for property tax purposes.



Project No. _____
Appeal Sequence No. _____

APPEAL OF AN ADMINISTRATIVE DECISION

TO THE THURSTON COUNTY HEARING EXAMINER COMES NOW _____
 on this ____ day of _____ 20__, as an APPELLANT in the matter of an administrative decision rendered
 on _____ 20__, by _____, relating to

THE APPELLANT, after review and consideration of the reasons given by the administrative official for his/her decision, does now, give written notice of APPEAL to the Hearing Examiner of said decision under the provision(s) of the ordinances marked below.

- | | |
|--|---|
| <input type="checkbox"/> 17.09.160 SEPA | <input type="checkbox"/> 18.10.070 PLATTING & SUBDIVISION |
| <input type="checkbox"/> 17.15.410 AG ACTIVITIES, CRITICAL AREAS | <input type="checkbox"/> 19.12.010 SHORELINE PROGRAM |
| <input type="checkbox"/> 20.60.060 ZONING | <input type="checkbox"/> 21.81.070 LACEY UGA ZONING |
| <input type="checkbox"/> 22.62.050 TUMWATER UGA ZONING | <input type="checkbox"/> 23.72.190 OLYMPIA UGA ZONING |
| <input type="checkbox"/> 24.05.050 CRITICAL AREAS | <input type="checkbox"/> 14.22.501 ABATEMENT OF DANGEROUS BUILDINGS |

STATE THE BASIS OF THE APPEAL AS OUTLINED IN SECTION "A" ON REVERSE SIDE OF THIS FORM.

(If more space is required, please attach additional sheet.)

AND REQUESTS that the Hearing Examiner, having responsibility for review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the administrative decision.

 APPELLANT NAME PRINTED

 SIGNATURE OF APPELLANT

Address _____

Phone: _____

Email: _____

Please do not write below - for Staff Use Only:

Filed with Community Planning & Economic Development this _____ day of _____ 20__,
 by _____. Filing fee of \$1960.00*, receipt no. _____ by _____.

*The filing fee will cover staff time (for Planning, Environmental Health & Development Review), and Hearing Examiner time to hear the appeal and issue a decision. Additional fees will be billed if warranted.

THURSTON COUNTY
PROCEDURE FOR APPEAL OF ADMINISTRATIVE DECISION TO HEARING EXAMINER

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

The following is a description of the rules of procedure for appeals before the Hearing Examiner.

A. A FILED APPEAL MUST BE IN WRITING AND CONTAIN THE FOLLOWING

1. A brief statement as to how the appellant is significantly affected by or interested in the matter appealed;
2. A brief statement of the appellant's issues on appeal, noting appellant's specific exceptions and objections to the decision or action being appealed;
3. The relief requested, such as reversal or modification.

B. PRE-HEARING CONFERENCE

1. All parties to an appeal hearing shall be prepared for a pre-hearing conference with the Thurston County Hearing Examiner. The pre-hearing conference is held to structure the scope of the hearing.
2. Pre-hearing conferences may be held by telephone conference call.
3. The Hearing Examiner shall give reasonable notice to parties of any pre-hearing conference. Notice may be written or oral.
4. All parties shall be represented at a pre-hearing conference unless they waive the right to be present or represented.
5. Following the pre-hearing conference, the Hearing Examiner may issue an order reciting the actions taken or ruling on motions made at the conference.

C. PARTIES REPRESENTATIVE REQUIRED

When a party consists of more than one individual, or is a group, organization, corporation, or other entity, the appellant shall designate an individual to be its representative, and inform the Hearing Examiner's office of the name, address and telephone number of the designated representative. The rights of such an appellant shall be exercised by the person designated as the party representative. Notice or other communication to the party representative is considered to be notice or communication to party.

D. PARTIES' RIGHTS AND RESPONSIBILITIES

1. Although Appellants and Applicants have the right to be represented by an attorney, representation by an attorney is not required. Attorney representation is not discouraged.
2. Where a party has designated a representative, the representative shall exercise the rights of the party.
3. All parties and others participating in and observing hearings shall conduct themselves with civility and deal courteously with all persons involved in the proceedings.

E. HEARING FORMAT

1. Appeal hearings, although generally informal in nature, shall have a structured format and shall be conducted in a manner deemed by the Hearing Examiner to make the relevant evidence most readily and efficiently available to the Examiner and to provide the parties a fair opportunity for hearing.
2. The order of an appeal hearing will generally be as follows:
 - a. Examiner's introductory statement;
 - b. Background presentation by Department;
 - c. Appellant's argument;
 - d. Department's presentation;
 - e. Applicant's presentation;
 - f. Rebuttal;
 - g. Closing argument of parties.

F. Hearing Examiner Decision will be issued within ten (10) working days of the hearing unless additional time is agreed to by the parties.